

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:NER:NED:BOS:TL-N-778-00

MAKnospe

date: APR - 6 2000

to: District Director, New England District  
Attn: E:PPQMB:SWinsten

from: District Counsel, New England District, Boston

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subject: [REDACTED] Form 872

EIN: [REDACTED]  
Statute of Limitations Expires [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This supplements our advice dated April 6, 2000 concerning the above-referenced taxpayer.

Based upon the advice contained in our April 6, 2000 memorandum, your office obtained a Form 872 *Consent to Extend the Time to Assess Tax*, signed on behalf of [REDACTED], as successor to the [REDACTED] and as alternative agent to the [REDACTED]. The Form 872 was captioned correctly and, as advised, an explanatory statement was correctly included at the bottom of the first page of the Form 872. The asterisks, however, which were intended to be placed at the end of the caption and at the beginning of the explanatory statement, were omitted from the Form 872.

You provided this office with a copy of the front page of the Form 872, and you have requested our advice as to whether a corrected Form 872, including the explanatory asterisks, must be obtained. You did not request advice and we did not provide advice concerning the address line; we note, however, that only the current address of [REDACTED], the successor corporation, should appear on that line.

It is our opinion that although the Form 872 is not perfect, it is defensible. The problems cited above are minor and inconsequential and do not affect the validity of the consent. It is not necessary, therefore, to obtain a corrected Form 872. This issue has been coordinated with George R. Johnson of Field Service, who agrees with this advice.

If there are any questions, you may contact Marvis A. Knospe at (617)565-7914.

GERALD J. O'TOOLE  
District Counsel

By: \_\_\_\_\_

DAVID N. BRODSKY  
Assistant District Counsel

Office of Chief Counsel  
Internal Revenue Service  
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EIN: [REDACTED]  
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This is in response to your request for advice regarding extending the statute of limitations for [REDACTED] with respect to the taxable year [REDACTED].

ISSUE

Under the described circumstances, where the taxpayer has merged into another corporation, which form should be used to extend the statute of limitations, what language should be included on the form and by whom should the form be signed.

CONCLUSION

The Service should obtain a Form 872 from [REDACTED] because [REDACTED] is an alternative agent for the [REDACTED] group for the taxable year ending [REDACTED], pursuant to Temp. Reg. § 1.1502-77T, and because [REDACTED] may also be the successor in interest by merger to [REDACTED] under state law.

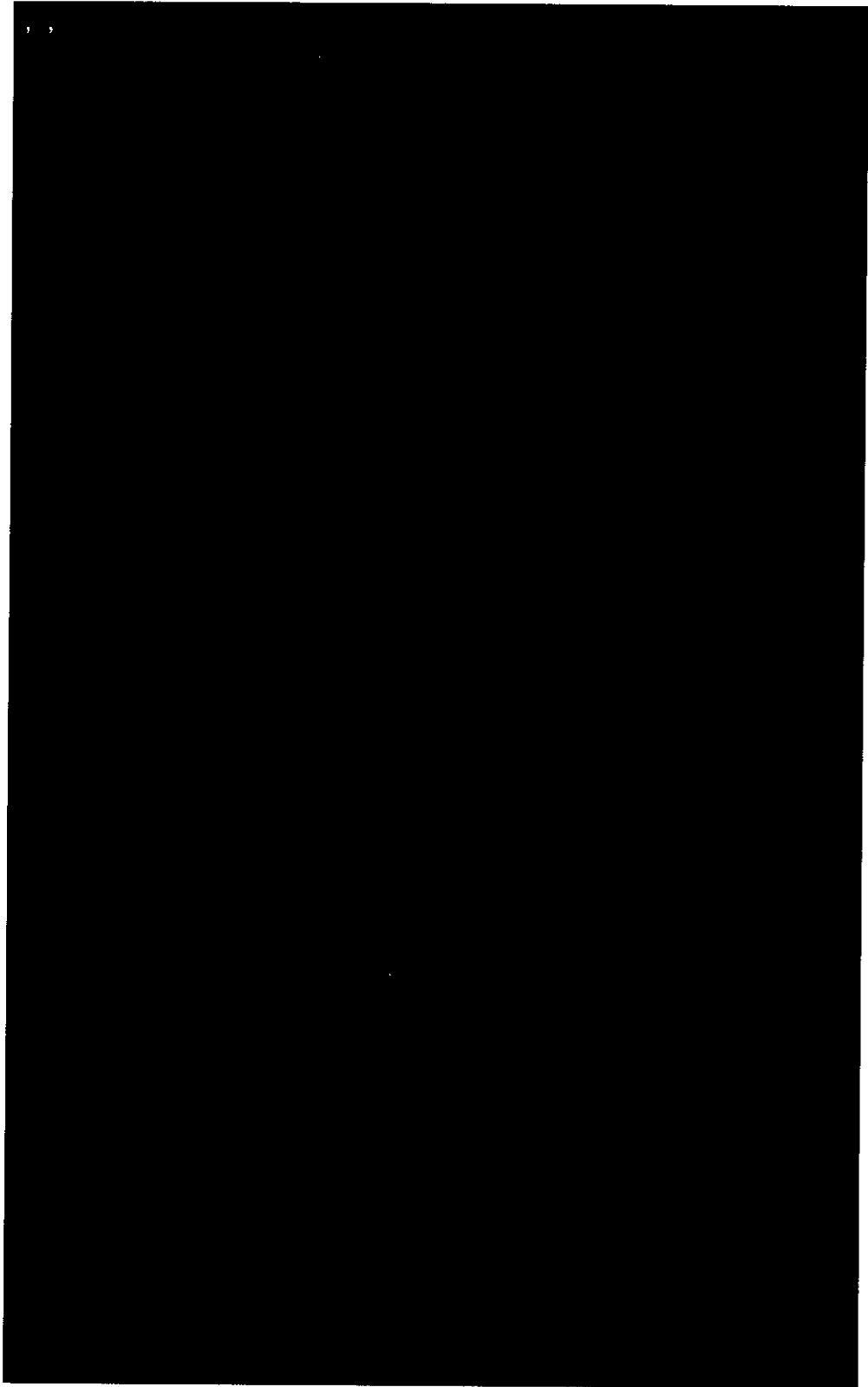
FACTS

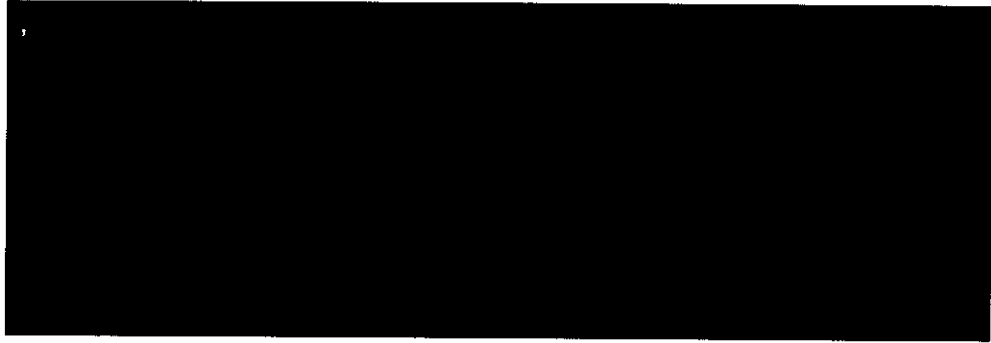
[REDACTED] was a [REDACTED] company, and a duly organized, validly existing corporation in good standing under the law of the State of [REDACTED]. On [REDACTED], [REDACTED], parent corporation of [REDACTED] affiliated entities, including [REDACTED] and [REDACTED], was merged into a [REDACTED] company called [REDACTED]. [REDACTED] is the [REDACTED] corporation in [REDACTED], with over \$ [REDACTED] in assets.

Each share of [REDACTED] common stock was converted into the right to received [REDACTED] shares of [REDACTED] common stock. The [REDACTED] stock was canceled, and [REDACTED] ceased to exist. The stock of the [REDACTED] subsidiaries was transferred to various subsidiaries of [REDACTED]. The stock of [REDACTED] was transferred to [REDACTED], a subsidiary of [REDACTED] and canceled, with [REDACTED] merging into [REDACTED]. The stock of [REDACTED] and [REDACTED], subsidiaries of [REDACTED], was transferred to [REDACTED] and canceled, with [REDACTED] merging into [REDACTED], a subsidiary of [REDACTED]. [REDACTED] additional subsidiaries of [REDACTED] were either liquidated or merged into existing subsidiaries of [REDACTED], and the remaining [REDACTED] subsidiaries remained in existence after the merger. These [REDACTED] entities made the election to file within the [REDACTED] consolidated return.

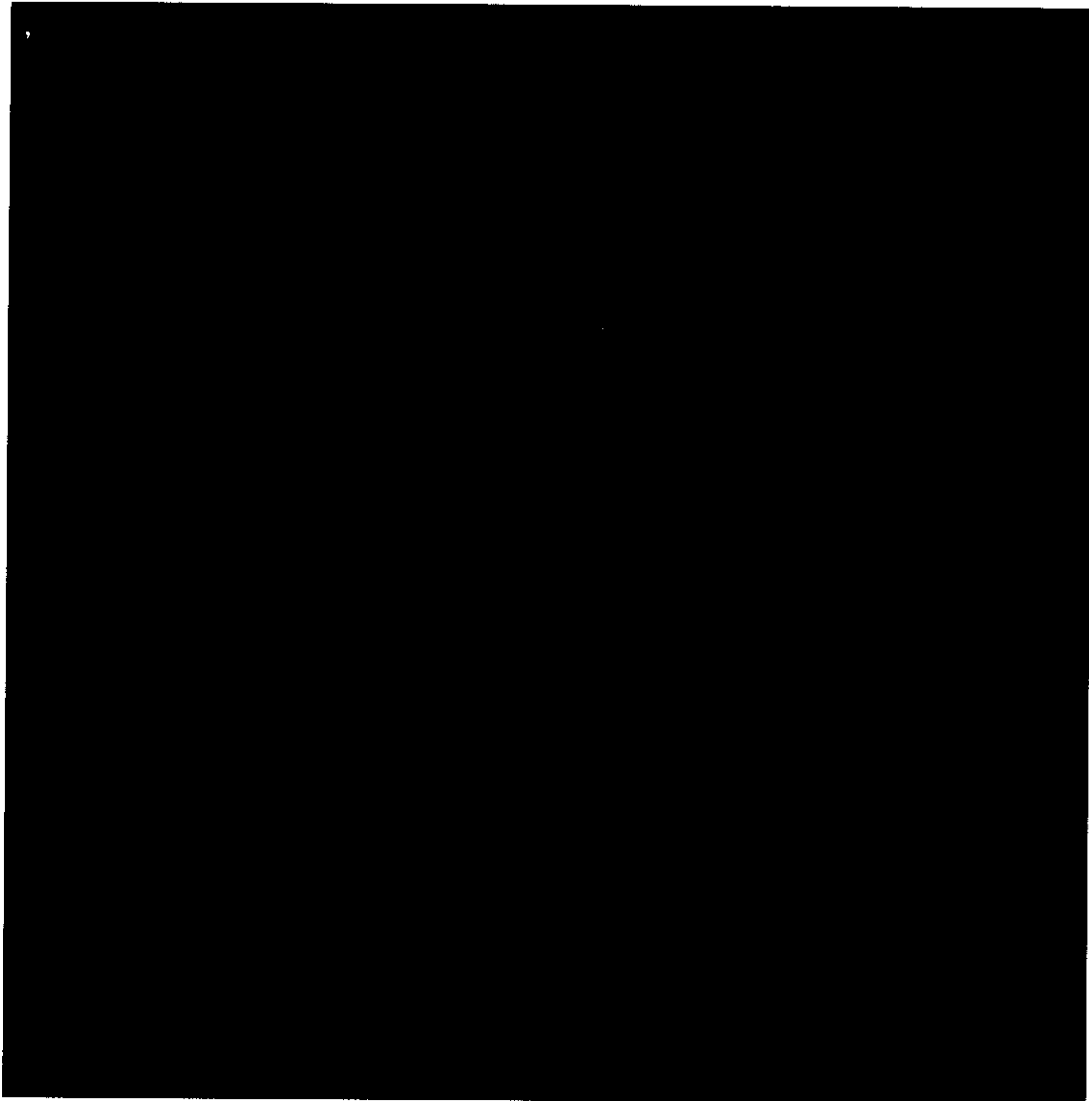
The merger of [REDACTED] into [REDACTED] was done in accordance with applicable provisions of the [REDACTED] Business Corporations Act and the [REDACTED] Business Corporations Act. Under [REDACTED] law, the effects of the merger are as follows:

[REDACTED]





Under [REDACTED] law, the effects of a merger are as follows:



[REDACTED]

[REDACTED]

In [REDACTED] filed claims for refund for the taxable years [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. The statute of limitations on assessment for taxable year [REDACTED] will expire on [REDACTED], therefore the Office of the District Director of Internal Revenue for the New England District is seeking to obtain agreement from the taxpayer to extend the statute for the taxable year [REDACTED].

The Office of the District Director for the District of New England has requested our advice with respect to the proper form to be used to obtain an extension of the statute of limitations for assessment with respect to the [REDACTED] taxable year of [REDACTED], the proper party to sign the consent on behalf of [REDACTED], and the appropriate language to use on the form.

#### DISCUSSION

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Thus, generally, the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Section 1.1502-77(c) provides that, unless the district director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

Treas. Reg. section 1.1502-77T provides for alternative agents and applies if the corporation that is the common parent of the group ceases to be the common parent, whether or not the group remains in existence. Temp. Reg. § 1.1502-77T provides that a waiver of the statute of limitations, with respect to the consolidated group, given by any one or more corporations referred to in paragraph (a)(4) of the section is deemed to be given by the agent of the group. subparagraph (a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice or waiver applies. In this case, the common parent, [REDACTED] merged into [REDACTED] and is no longer in existence. Therefore, this subparagraph cannot apply.

Under Treas. Reg. § 1.502-77T(a)(4)(ii), the alternative agents for the group include "a successor to the former common parent in a transaction to which I.R.C. § 381(a) applies." Section 381(a) applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which I.R.C. § 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of I.R.C. § 368(a)(1). On [REDACTED] [REDACTED] merged into a [REDACTED] company called [REDACTED] with [REDACTED] surviving. If the merger is an "A" reorganization, I.R.C. § 381 will apply. If so, pursuant to Temp. Reg. § 1502-77T(4)(ii), [REDACTED] would be an alternative agent for the [REDACTED] consolidated group for the taxable year [REDACTED]. Any waiver given by [REDACTED] with respect to this pre-merger taxable year of the [REDACTED] consolidated group would be deemed to be given by the agent of the group.

The merger was pursuant to state law. This is one of the requirements for an "A" reorganization. However, it is not sufficient alone to ensure the application of I.R.C. § 368(a)(1)(A). There are certain requirements which must be met in order for the statutory merger to qualify as an "A" reorganization. First, there must be a continuity of proprietary interest, i.e., the shareholders of the merged entity must maintain a proprietary interest in the surviving entity. Treas. Reg. §§ 1.368-1(b) and (c). In the merger, all of the shareholders of [REDACTED] received common stock in [REDACTED] and maintained a continuing interest in the surviving corporation. Accordingly, this requirement is met in this case. There must be a business purpose for the merger. Treas. Reg. § 1.368-1(b) and (c). We do not know whether this requirement has been met. There must be a continuity of business activity of the merged entity. Treas. Reg. § 1.368-1(d). We do not know whether this requirement has been met.

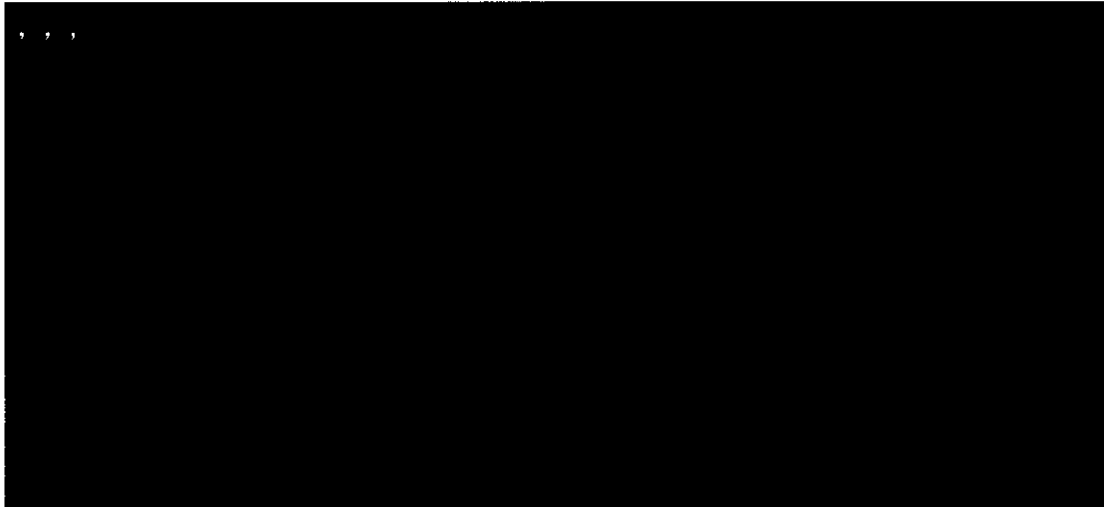


For purposes of this advice, we will assume that the facts as developed will most likely indicate that the above-noted requirements are met and that the merger constitutes a tax-free "A" reorganization under I.R.C. § 368(a) and, therefore, that I.R.C. 381 would apply to this reorganization. Our advice will be based upon this assumption. If the merger constitutes an "A" reorganization, the Service can rely on subparagraph (4)(ii) of Temp. Reg. § 1.1502-77T in this case. Accordingly, [REDACTED] is an alternative agent for the [REDACTED] consolidated group and is the proper party to execute a Form 872 with respect to the taxable year [REDACTED] of the [REDACTED] consolidated group. If the merger does not constitute a tax-free reorganization, then Temp. Reg. § 1.1502-77T would not apply and under Treas. Reg. § 1.1502-77T, [REDACTED] would not be an alternative agent for the [REDACTED] consolidated group for the pre-merger years.

We are relying on Temp. Reg. § 1.1502-77T, which treats [REDACTED] as the alternative agent in this case, as a basis for obtaining a Form 872 from [REDACTED]. However, another reason for obtaining a Form 872 from [REDACTED] is that [REDACTED] may be a successor in interest by merger to [REDACTED]; [REDACTED] may be a successor in interest by merger to [REDACTED], and [REDACTED] may be a successor in interest by merger to [REDACTED] and [REDACTED]. The surviving or resulting corporation in a merger or consolidation under state law may validly sign an extension agreement on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 448. Successor liability may be established in this case. Section [REDACTED] of the [REDACTED] Business Corporations Act provides, in part:

[REDACTED]

Section [REDACTED] of the [REDACTED] Business Corporations Act provides, similarly, in part:



[REDACTED]. Section 8.8 of the Agreement and Plan of Merger itself states that the "Agreement shall be governed by and construed in accordance with the law of the State of [REDACTED] applicable to agreements made and entirely to be performed within such jurisdiction."

If, as it appears, the merger of [REDACTED] into [REDACTED] was effected under [REDACTED] law, then [REDACTED] is primarily liable for [REDACTED]'s debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988). § [REDACTED].

We recommend the Form 872 be captioned as follows: "[REDACTED] (EIN: [REDACTED]), as successor to the [REDACTED], and as alternative agent to the [REDACTED] (EIN: [REDACTED]) and Subsidiaries Consolidated [REDACTED]."\* On the bottom of the form, you should add the following: \*"With respect to the consolidated tax liability of the [REDACTED] (EIN: [REDACTED]) and Subsidiaries [REDACTED] for the taxable year ending [REDACTED]."

Certain subsidiaries of [REDACTED] into which subsidiaries of [REDACTED] were merged, including [REDACTED] and [REDACTED], are also liable as successors by merger. Based upon your assessment of the assets and financial condition of the parent [REDACTED], however, we do not believe that it is necessary to also obtain consents from [REDACTED] and [REDACTED].

Under Treas. Reg. § 301.6901-1(b) a surviving corporation in a merger is also secondarily liable as a transferee, because a transferee at law includes a successor of a corporation. We believe that the established facts will support the Service's primary reliance on [REDACTED]'s liability as an alternative agent pursuant to Temp. Reg. § 1.15602-77T, and as a successor by merger under state law. The use of the Form 872 to extend the statute of limitations with respect to [REDACTED] is adequate, therefore, and need not be supplemented by the use of a Form 977 *Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary* at this time. This will not prevent consideration of transferee liability assessments, if appropriate, at a later time.

You have advised us that, if approved by the [REDACTED], [REDACTED] intends to acquire [REDACTED] and merge [REDACTED] into one or more subsidiaries of [REDACTED]. On the date of merger, expected to be either [REDACTED] or [REDACTED], [REDACTED] will change its name to [REDACTED], although the ein number of [REDACTED] will not change. The following advice regarding the proposed transaction is tentative and should not be relied on until the proposed transaction occurs according to the proposed facts.

In that regard, we have determined that [REDACTED] is a successor to [REDACTED] and an alternative agent by reason of being a successor to the former members of the [REDACTED] group. These conclusions should not change where [REDACTED] is not going out of existence, but simply acquiring a subsidiary. The merger of [REDACTED] into one or more of [REDACTED]'s subsidiaries, whether or not [REDACTED] survives, doesn't change these conclusions. Further, from the facts provided, if the Service now obtains a Form 872 from [REDACTED], such consent will be binding on [REDACTED] and any successor of [REDACTED] primarily liable for [REDACTED]'s debts, which include the several liability of [REDACTED] for the [REDACTED] group's consolidated taxes. Further, if [REDACTED] is a successor to [REDACTED] in a transaction that qualifies under section 381(a), any extension executed by [REDACTED] during its existence will bind the former members of the [REDACTED] group.

The name change will not affect a Form 872 executed prior to the name change. However, if the Form 872 is executed after the date of the name change, then the taxpayer identification block should be captioned as follows: " [REDACTED] (EIN: [REDACTED]) , formerly [REDACTED] (EIN: [REDACTED]) , as successor to the [REDACTED] and as alternative agent to the [REDACTED] (EIN: [REDACTED]) and [REDACTED]. "\* On the bottom of the Form 872, you should add the following: \*"With respect to the consolidated tax liability of the [REDACTED] (EIN: [REDACTED]) [REDACTED] for the taxable year ending [REDACTED]. "

Since there appears to be no further action to be taken by our office we have marked our file in this case close. There are no administrative files to be returned to your office. If there are any questions, you may contact Marvis A. Knospe at (617)565-7914.

GERALD J. O'TOOLE  
District Counsel

By: \_\_\_\_\_  
DAVID N. BRODSKY  
Assistant District Counsel

Attachments